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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1966

No. 751

SIDNEY J. UNGAR,

*Petitioner,*

v.

THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK,

*Respondent.*

## PETITIONER'S REPLY TO BRIEF IN OPPOSITION

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Counsel for respondent Bar Association have inexplicably pressed to the limits of advocacy in their effort to discourage on wholly extraneous considerations review by this Court of petitioner's claims of constitutional violations. Displaying the prosecutorial fervor that since 1959 has permeated the various proceedings which had their origin in the *New York Post's* journalistic vendetta,[1] they would thus finalize the disbarment of an attorney

[1] The notoriety of the events of which the disbarment proceedings are a part is evidenced by the large, prominent headlines which were generated by each episode of the unfolding drama. Petitioner's disbarment on the complaint of the District Attor-

with an unblemished record of some 25 years at the Bar. The punitive aspects of the disciplinary proceeding are highlighted by the fact that petitioner, who in recent years has been preoccupied with real estate transactions and prominently identified with philanthropic organizations (R. 111), has not been an active practitioner for almost a decade.

Respondent's superficial discussion of the constitutional questions presented by the petition suggests that it has been unable to discover substantive reasons for opposing it on the merits. Nevertheless, adopting the role of zealous prosecutor, it vigorously opposes the petition in the following manner: (1) Without controverting petitioner's statement, it devotes half its brief to recounting disputed occurrences which are irrelevant to any issues for the obvious purpose of attacking his character and persuading the Court that he is a person whose claims of constitutional violations should not be considered regardless of their merit. (2) It omits reference to very significant material in the record in erroneously advancing the argument that petitioner has abandoned the important claim that his constitutional privilege against self-incrimination has been violated. And (3), without discussion of statutory and decisional authority directly pertinent to the question, it cavalierly and incorrectly asserts that the charge of aiding and abetting the violation of the city charter did not charge petitioner with a criminal violation.[2]

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ney, which was forecast by the prosecuting attorney at the very beginning of the story (Pet. p. 8, n. 4), is the denouement of the story. Photocopies of illustrative headlines are incorporated in the appendix to this brief.

[2] Respondent also argues there was no violation of due process in connection with the charge of conviction of criminal contempt.

### 1. Charge of Conspiracy To Obstruct Justice.

The petition claims a denial of procedural due process in the finding that the charge relating to the statutory crime of "conspiracy" to obstruct justice was established without a finding of conspiracy (Pet. pp. 32-33). Although carefully avoiding a direct statement that the Referee found any conspiracy (Resp. Br. pp. 26-30),[3] respondent argues "that the Referee found the charge to have been established" and embarks upon an "extensive discussion of the evidence relating to this charge" for the purported purpose of demonstrating that the Referee so found (Resp. Br. pp. 2, 6-16, 26-30).

The alleged conspiracy, as defined by respondent's bill of particulars, was clearly rejected by the Referee's specific findings, as well as his omission to make a finding of conspiracy.[4] Respondent's extended recital of petitioner's alleged "conduct" cannot be justified, therefore, on the ground that it shows that the Referee made a finding of a conspiracy. The obvious purpose of this detailed elaboration of unfounded disparaging insinuations is to prejudice the consideration of petitioner's claims of violations of his constitutionally protected rights. The

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[3] Respondent also appears to be avoiding the direct claim of conspiracy which it suggests by innuendo. For example, it states that a description of certain events "is essential to an understanding of the obstruction of justice charge" (Resp. Br. p. 2) and discusses this subject in its Statement of the Case under the caption "Obstruction of Justice" (Resp. Br. p. 7). It should be noted that respondent refers to "obstruction of justice" and not *conspiracy* to obstruct justice despite the fact that the charge is based upon a "violation of Penal Law, Section 580" which relates to conspiracy and that obstruction of justice does not appear to be a statutory crime in New York.

[4] The fact that the "Referee was fully aware of the nature of the charge before him", as evidenced by his "correctly referring to the charge as one of 'alleged conspiracy to obstruct justice'" (Resp. Br. p. 30), contrary to respondent's contention, demonstrates that his omission of any finding of conspiracy was deliberate.

falsity of these charges was clearly demonstrated in petitioner's Supplemental Brief filed in the Appellate Division. Since they are irrelevant to the issues here, petitioner will not join in respondent's diversionary tactic by debating their inaccuracy at this time.

Charge IV was that petitioner "conspired with Hulan E. Jack to obstruct justice and the administration of the New York City Charter by concealing certain payments to Fred Bechtel" on Jack's behalf. Petitioner's demand for a bill of particulars in the disciplinary proceeding dated November 15, 1962, requested respondent to state the following (par. 7):

> (d) From whom is it claimed that the respondent conspired to conceal certain payments to Fred Bechtel and others, that is - from a District Attorney, a Grand Jury, a court or otherwise?

Respondent's bill of particulars, dated December 5, 1962, answered as follows (par. 7):

> (d) A District Attorney or representatives thereof and others not presently known to the petitioner.

The bill of particulars thus makes clear that the conspiracy alleged related to concealment by petitioner's misstatement to Scotti since there is no particularization of the conspiracy to obstruct justice by concealing the payments from the grand jury. This was clearly understood by the Referee whose report states that "the most important" respect in which petitioner was charged with having obstructed justice was his misstatement to Scotti (R. 82). The concluding paragraph of the Referee's report with respect to this charge relies entirely on this misstatement to Scotti on the afternoon of December 11 (R. 95). Thus, the first sentence in this paragraph reads as follows (R. 95):

> In my opinion, respondent [petitioner here], for the purpose of obstructing and defeating the administration of justice, willfully and knowingly gave

> Assistant District Attorney Scotti false information concerning important and material facts involved in a grand jury investigation.

In the following and concluding sentence of this paragraph, making clear that his conclusion that the charge was established was based on this statement, the Referee stated (R. 95):

> Consequently, in my opinion, this charge has been established.

Respondent's claim that this misstatement to Scotti resulted from a conspiracy with Jack to obstruct justice is rejected by the Referee's finding that as late as the meeting of Wednesday evening, December 9th, the only matter considered was adverse publicity and that "there is nothing to indicate" that at that time any thought had been given to the possibility that petitioner's loan to Jack "might result in any criminal investigation, proceeding or prosecution."[5] Respondent does not challenge the statement in the Petition (p. 21) that "There is no evidence, and no suggestion by the Referee, of any subsequent agreement to tell this story for any other purpose when petitioner, on Friday, December 11th, denied to Assistant District Attorney Scotti that he had made the payments for Jack." The finding of the Referee that the agreement reached at the meeting on December 9th was related only to the avoidance of unfavorable publicity for

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[5] The full quotation from the referee's report with respect to the meeting on the evening of December 9, 1959, is as follows (R. 72):

> The only thing discussed at this meeting was publicity, i.e., what "cover-up" story could be prepared for use if the Post should break the story as Bechtel had given it to Haddad. There was no mention of, or reference to, the District Attorney, or to the possibility that any crime was involved, or to any grand jury investigation, and there is nothing to indicate that up to this time, at least, anyone thought that the transaction between respondent and Jack might result in any criminal investigation, proceeding or prosecution.

Jack is equivalent, therefore, to a finding that petitioner's statement to Scotti on December 11th was not a part of any conspiracy to obstruct justice. [6]

The Referee's detailed narrative of events following petitioner's awareness of a criminal investigation does not contain a finding of a subsequent conspiracy to obstruct justice. Respondent's speculation as to the purpose of the Referee's "lengthy consideration of conferences and meetings participated in by petitioner" after his meeting with Scotti (Resp. Br. p. 30) is no substitute for a finding of conspiracy which the Referee did not make. [7] If petitioner is to be disbarred for having conspired to obstruct justice, a finding of conspiracy should be unequivocally clear. It should not be clothed in terms of a finding of obstructing justice — a charge of which petitioner had no notice.

### 2. Petitioner Did Not Abandon Claim of Violation of Self-Incrimination Privilege.

Respondent asserts that petitioner "categorically abandoned" the claim of a violation of his privilege against self-incrimination by his counsel's statement on February 27, 1963, that it did not appear "that the self-incrimination provisions of the Federal Constitution are

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[6] Nothing in the referee's report intimates that petitioner had any knowledge of the possibility of a criminal investigation before the Friday afternoon, December 11, 1959, when he made the acknowledged misstatement to Scotti. Quite obviously none of the events which preceded this knowledge, even if accurately described by respondent, could be part of a conspiracy to obstruct justice. Respondent's sham excuse for its protracted exposition with respect to this prior period is thus laid bare.

[7] Respondent argues that petitioner's claim that the referee made no finding of conspiracy ignores "all but one paragraph of the forty-five pages of the report (Report pp. 50-95) devoted to the charge" (Resp. Br. p. 26). The fact is that in these 45 pages the referee makes no finding resembling one of conspiracy and not once in the text of this 45-page discussion uses the word "conspiracy".

involved" and that there were grounds for "striking out the reference to the Federal Constitutional privilege against self-incrimination" (Resp. Br. p. 18). Respondent's argument appears somewhat disingenuous in light of the full context of the statement, subsequent pleadings filed by petitioner renewing the claim, and the course of the decisions of this Court with respect to the applicability of the privilege against self-incrimination to State proceedings.

Violation of petitioner's self-incrimination privilege, based upon the filing of disciplinary charges concerning matters with respect to which his testimony before the grand jury was compelled by a grant of immunity, was claimed in the Fifth Affirmative Defense in petitioner's answer to the charges. The statement upon which respondent relies was contained in an affidavit filed in opposition to respondent's motion to strike petitioner's affirmative defenses and appears to be less an abandonment of the claim than a concession that, phrased in terms of self-incrimination rather than due process, it did not appear to have merit, presumably, because at that time the self-incrimination provisions of the Federal Constitution had been held inapplicable to State proceedings. But the affidavit did not acquiesce in "striking out the reference to the Federal Constitutional privilege against self-incrimination." In the following sentence, not quoted by the bar association, the affidavit continued: "We see no necessity to take such action with respect to a legal argument, particularly since it would require respondent [petitioner here] to amend the answer by adding the words 'under the State Constitution and his right to due process of law under the Federal and State Constitutions.'"

Petitioner's continued reliance on violation of due process because of charges based on matters with respect to which he had been granted immunity is clear. The fifth affirmative defense claimed not only a violation of his constitutional privilege against self-incrimination but also "his right to due process of law". The affidavit

upon which respondent relies for its claim of abandonment stated that, although the self-incrimination provisions of the Federal Constitution did not seem to be involved, "the right to federal due process is involved." In view of this Court's decision more than a year later in *Malloy v. Hogan*, 378 U.S. 1, that the self-incrimination prohibitions of the Fifth Amendment with respect to the Federal Government are applicable to the States through incorporation in the Fourteenth Amendment, petitioner's reliance upon the Fourteenth Amendment with respect to the impropriety of basing charges upon matters with respect to which he had been granted immunity can hardly be considered an abandonment of the claim.

In any event, any lack of confidence which petitioner may have expressed with respect to protection against self-incrimination under the Federal Constitution would obviously be justified under this Court's decision in *Twining v. New Jersey*, 211 U.S. 78; *Adamson v. California*, 332 U.S. 46; and *Cohen v. Hurley*, 366 U.S. 117. It was not until June 15, 1964, in *Malloy v. Hogan, supra*, that this Court held the standards of the self-incrimination provisions of the Fifth Amendment applicable to the States. In the circumstances, it would be difficult to find a voluntary waiver or abandonment of this important constitutional right on the basis of acknowledged doubts as to the validity of the claim. "There is a presumption against a waiver of constitutional rights * * * and for a waiver to be effective it must be clearly established that there was 'an intentional relinquishment or abandonment of a known right or privilege'". *Brookhart v. Janis*, 384 U.S. 1, 4. If every reasonable presumption against the waiver of fundamental constitutional rights is indulged (*Johnson v. Zerbst*, 304 U.S. 458, 464; *Glasser v. United States*, 315 U.S. 60, 70), the "high standards of proof for the waiver of constitutional rights" to establish that "the waiver is made voluntarily, knowingly, and intelligently" (*Miranda v. Arizona*, 384 U.S. 436, 475) have obviously not been met.

The speciousness of respondent's argument is demonstrated, moreover, by petitioner's reiteration of the claim both in the Appellate Division and in the Court of Appeals after its alleged abandonment. Petitioner filed in the Appellate Division a notice of motion and affidavit dated April 22, 1963, seeking leave to appeal to the New York Court of Appeals from the order of the Appellate Division entered on March 21, 1963, striking petitioner's affirmative defenses. The notice of motion set forth as a question for review "Whether the granting of immunity to respondent [petitioner here] by virtue of his testimony before a grand jury does not include protection against a disciplinary proceeding". A supporting affidavit stated that "the questions involve matters * * * of constitutional law (5th affirmative defense)" and prayed leave to appeal upon the questions of constitutional law set forth in the fifth affirmative defense.

In the Court of Appeals, petitioner's affidavit in support of his motion for leave to appeal from the order of disbarment specifically refers to the affirmative defenses set forth "as paragraphs 6 through 27 of my answer in this disciplinary proceeding." (p. 20) The fifth affirmative defense which claims violation of the privilege against self-incrimination under the Federal Constitution is set forth in paragraphs 19 and 20 which are embraced in the paragraphs to which petitioner's affidavit made specific reference. Although petitioner stated that the fourth and sixth affirmative defenses were "principally" involved in the motion for leave to appeal, he did not indicate that he relied on them "exclusively" and clearly, therefore, did not exclude his reliance on the fifth affirmative defense. The reluctance of petitioner to place particular stress on the fifth affirmative defense involving the privilege against self-incrimination under the Federal Constitution is readily understandable in light of the Court of Appeals' decision in *Spevack v. Klein*, 16 N.Y. 2d 1048, 213 N.E. 2d 457, certiorari granted, 382 U.S. 942, which affirmed an order of the Appellate Division,

Second Department, disbarring an attorney upon his refusal to testify and produce his records in reliance upon the privilege against self-incrimination under the Federal Constitution.

An affidavit verified June 7, 1966, in support of a "motion for an order amending the within disbarment order of April 21, 1966 by inserting in said order a provision that in this disciplinary proceeding there were presented and necessarily passed upon questions under the Constitution of the United States, viz, whether respondent's rights under the Fifth, Sixth and Fourteenth Amendments were violated, and that the courts held that they were not," quoted the portions of the affidavit just discussed filed in the Court of Appeals relating to striking of the affirmative defenses in petitioner's answer. It seems clear, therefore, this constitutional claim was not, as respondent asserts, "categorically abandoned" in an affidavit dated February 27, 1963.

### 3. Criminal Contempt Conviction as Basis for Disbarment.

Respondent's assertion "that petitioner was afforded all of the elements of due process" in connection with the charge of conviction of criminal contempt, based upon the referee's statement that he had an opportunity in the disciplinary proceeding to present evidence in defense or mitigation of his conduct (Resp. Br. p. 22), is contradicted by the referee's report and the confirming decision of the Appellate Division.

Respondent's argument completely disregards the fact that there were two separate and distinct charges in the disciplinary proceeding which related to petitioner's conduct in the second Jack trial. The first charge was that during the course of the Jack trial petitioner engaged in conduct "which resulted in his being found guilty of criminal contempt of court on or about December 13, 1960." The second charge was that on or about November 25,

1960, in the course of the Jack trial, petitioner "shouted at the court, while the court was in session and in the immediate hearing and presence of the jury" the utterance which was the subject of the contempt conviction.

The referee dealt with each charge separately and made separate conclusions with respect to each charge. As to the charge of conviction of criminal contempt, he described the course of the contempt proceeding through various courts including this Court (R. 96-98) and concluded, "Accordingly, this charge is established as a matter of law" (R. 97). With respect to the second charge based upon the utterance itself, after reviewing in some twelve pages of his report the events at the Jack trial and the evidence in the disciplinary proceeding (R. 99-110), the Referee stated that petitioner "admits having uttered the language attributed to him in the charge, as amended, and that he shouted it at the Court, while the Court was in session, and in the immediate hearing and presence of the jury." The Referee concluded that "The charge is, accordingly, admitted" and that petitioner had not presented any adequate justification or excuse for his conduct (R. 110-111). It was only in connection with the second charge that the referee stated that petitioner was afforded an opportunity to present evidence in defense or mitigation of his conduct. No such opportunity was presented with respect to the first charge which was regarded to be established as a matter of law. The Appellate Division similarly set forth the two charges separately (App. 1a)[8] and confirmed the findings of the Referee sustaining the charges (App. 2a) which, as we have seen, dealt with the two charges separately. Its opinion specifically relies on the criminal contempt conviction, stating that petitioner "was found guilty of contempt of court by the judge who presided at the trial" (App. 5a).

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[8] These references are to the Appendix to the Petition.

As the petition pointed out and as Mr. Justice Harlan noted in his memorandum of September 30, 1966, relating to the stay of the disbarment order, the Appellate Division "did not explicitly discriminate among the grounds upon which its disbarment order was based"; the effect of each charge with respect to the disbarment order, therefore, cannot be separately measured (Pet. p. 22). Thus, there is no basis for concluding that a disbarment order would have resulted if there had been no conviction of criminal contempt and no charge in the disciplinary proceeding based upon this conviction. Whether or not the outcome in the disciplinary proceeding would have been the same if petitioner's utterance alone was the subject of a charge is a matter of pure speculation.

Furthermore, treating the charge of conviction of criminal contempt as established as a matter of law had the effect in the disciplinary proceeding of casting upon petitioner the burden of proving that his conduct, already conclusively presumed to be contemptuous, might be excused by extenuating circumstances. Thus, the proponent of the charges in the disciplinary proceeding offered no witnesses to carry the burden of proving de novo that petitioner's conduct was contemptuous or to establish the circumstances of the utterance. Instead, the contempt was considered to have been established and the burden was thrust upon petitioner to prove justification or mitigation.[9] The contempt conviction was, therefore, a sig-

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[9] Petitioner's fourth affirmative defense which was stricken by the Appellate Division attempted to put in issue the correctness of the contempt conviction by alleging that the statements to the court which were the subject of the contempt conviction were made when petitioner was under unusual pressure from the court and from counsel for both parties and was in a highly emotional state, and further asserted that the statements made were true, setting forth the bases upon which this assertion was made. The Appellate Division's denial of another effort of petitioner to deal with the contempt conviction charge by taking certain depositions is described in petitioner's affidavit in support of his motion in the Court of Appeals for leave to appeal from the order of disbarment as follows (pp. 22-23):

nificant factor in the disciplinary proceeding. But, as the petition points out, vital aspects of procedural due process for any punishment other than for a petty offense of criminal contempt were lacking.

**4. Aiding and Abetting Violation of City Charter.**

The petition urges that, since disbarment is the means for inflicting punishment for a criminal offense not related to professional conduct, due process requires the procedural safeguards of a criminal trial. Respondent contends that petitioner has not raised this issue before, that aiding and abetting violation of the City Charter provisions is not a criminal charge, and that the due process procedural safeguards for the imposition of criminal sanctions do not apply to civil proceedings.

Although petitioner did not previously urge in precise terms that he was entitled to the procedural safeguards of a criminal trial, he did raise the issue of due process under the Federal Constitution on numerous occasions in contexts which clearly implied that the charge of aiding and abetting violation of the City Charter should be treated as criminal in nature. In his Fifth Affirmative Defense, petitioner asserted that the institution of the disciplinary proceeding on the basis of this charge vio-

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By order to show cause dated September 6, 1963, supported by affidavit of same date, application was made on my behalf to take the depositions of Mr. Justice Sarafite, District Attorney Hogan and Assistant District Attorney Scotti, in advance of the Referee hearings. This was another effort on my behalf to place the matter in what I respectfully deemed to be the appropriate context and setting of fairness in light of my contention that the disciplinary charges were the outgrowth of a basic miscarriage of justice against me done during the course of the Hulan Jack trials and my own resultant conviction for contempt before Mr. Justice Sarafite. The application referred to was denied by the Appellate Division on December 17, 1963.

lated his right to due process of law because of the grant of immunity. His brief filed in the Appellate Division in opposition to the referee's report alleged this charge "is created ad hoc for this proceeding" and "that such post facto tailoring does not comport with elementary due process" (p. 18). In the brief filed in the Court of Appeals in support of his motion for leave to appeal from the order of disbarment, petitioner argued that the burden of proof in disciplinary proceedings "is one lying intermediately between the burden applied in a civil forum and that applied in a criminal forum," that the "exacting manner" in which the burden of proof was applied reflected "the solicitude with which Anglo-American jurisdictions have traditionally regarded the right of a licensed attorney or counsellor to pursue his profession in a proper manner" (p. 9), that in disciplinary proceedings there is "a distinctive requirement of judicial proof" which "is in a significant degree more exacting than the conventional standard of 'preponderance' applied generally in civil cases" (p. 10), and that construction of the facts to establish a violation of the charter renders "those statutes constitutionally void on account of vagueness" (p. 25).[10]

Respondent's claim that aiding and abetting the violation of sections 886 and 901 of the New York City Charter is not a criminal offense disregards express statutory provisions to the contrary. Although the charter provisions declaring the prohibited conduct a misdemeanor are directed solely to officers and employees of

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[10] In petitioner's affidavit filed in the Court of Appeals in support of his motion for leave to appeal, petitioner noted that he had "urged that the disciplinary charges be dismissed on the ground that the statutes upon which they were based were constitutionally void on account of vagueness," requested the appointment of an advisory jury, and asserted "due process unconstitutionality (on account of vagueness)" of the New York City Charter provisions (pp. 21, 27).

the City, other provisions of the New York Penal Law, which are referred to in the petition (Pet. p. 31, n. 20), make it a crime for any person to aid or abet the commission of a misdemeanor.[11] Respondent does not explain why these statutory provisions are inapplicable or even take note of them. Nor does it discuss the decision of the New York Court of Appeals in *People v. Brody*, 298 N.Y. 352, 83 N.E. 2d 676, 679, involving a comparable situation, in which the court stated:

> Nor does it matter that Auditore, not being a public official, could not, on his own account, have committed a crime under section 1826. As an aider and abettor of Brody, who was of the class of persons who could commit the crime as defined in the statute, Auditore, too, could be held as a principal. Penal Law, § 2; * * *.

It prefers to rely upon the authority of petitioner's statement on another occasion that the charter provisions are directed to the City officials and not to the person who gives a loan or gratuity to them.

With respect to the applicability of due process safeguards pertinent to criminal sanctions,[12] this Court has

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[11] The text of these provisions follows:

Section 2: "Principal. A person concerned in the commission of a crime, whether he directly commits the act constituting the offense or aids or abets in its commission * * * is a 'principal'."

Section 27: "A person who commits or participates in an act which would make him an accessory if the crime committed were a felony, is a principal and may be indicted and punished as such, if the crime be a misdemeanor."

Section 1936: "When an act or omission is declared by statute to be a misdemeanor, and no punishment for aiding or abetting in the doing thereof is expressly prescribed, every person who aids or abets another in such act or omission is also guilty of a misdemeanor."

[12] It should be noted that petitioner's claim to procedural due process for criminal proceedings is made with respect to the limited circumstance in which disbarment is chosen as the

recognized that disbarment is equivalent to criminal punishment (see Pet. pp. 23-25) and that constitutional standards are determined by the nature of the proceeding and not by its denomination as "civil" or "criminal". *Trop v. Dulles*, 356 U.S. 86; *Kennedy v. Mendoza-Martinez*, 372 U.S. 144. The relevance of the standard of proof to the severity of the sanction was recently reiterated in *Woodby v. Immigration and Naturalization Service*, Nos. 40 and 80, this Term, decided December 12, 1966.[13]

Respectfully submitted,

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means for imposing punishment for a criminal offense which is not related to the practice of law; it is not urged as a general rule for disciplinary proceedings.

[13] Although the case was decided on nonconstitutional grounds, the decision is not without due process implications. Cf. *Kennedy v. Mendoza-Martinez*, *supra*.